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In the Supreme Court
State Of North Dakota

October 26, 2022
Supreme Court No. 20220222
Grand Forks County Number: 18-2021-CV-02258

Senske Rentals, LLC., a North Dakota Limited Liability Company,

and

Sierra Investments, LLC., a North Dakota Limited Liability Company,

Petitioners and Appellants,

vs.

City of Grand Forks, a political subdivision of the State of North Dakota,

Respondent and Appellee.

APPEAL FROM MEMORANDUM DECISION AND ORDER AFFIRMING THE COMMISSION'S DECISION ENTERED BY THE DISTRICT COURT OF GRAND FORKS COUNTY, NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT THE HONORABLE JOHN THELEN, PRESIDING

REPLY BRIEF OF PETITIONERS AND APPELLANTS
SENSKE RENTALS, LLC. AND SIERRA INVESTMENTS, LLC.

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LAW AND ARGUMENT

[1] While this Court has sanctioned in many respects the use of a formula in determining a special benefit it seems axiomatic that the formula should apply evenly to all properties in the city and if the use of the formula is merely a derivative of the arbitrary cost of construction that formula is discriminatory, arbitrary, capricious, and legally unreasonable. In this case the city used a formula based upon the square footage of each property to be specially assessed. *See* Appellee's Brief at ¶34. The obvious question:

> If the special ***benefit*** conferred upon a property is calculated as a function of a properties measured ft^2 being specially assessed, how can the calculated ***benefit***, to use the Special Assessment Commission's findings "allow[ing] drainage to public and private property to include streets, allows increased impervious surface areas caused by development, safely conveys storm water from the benefitting area and provides sanitary method of moving and holding storm water", vary from one district to another?

[2] It defies logic—when using a formula based upon a static number like the ft^2 contained in any one parcel of land—that the ***special benefit*** to any one parcel of land being drained of its storm water is variable. Either the parcel of land is drained by an installed storm water infrastructure or it is not. For example, if the benefit received by a parcel of land from the installation of storm water infrastructure city wide has been calculated to be $100.00 per square foot that must be the formulated special benefit per square foot of land serviced by the storm water infrastructure. According to N.D.C.C. §40-23-07 the assessment against any lot or parcel of land must not exceed the benefit which has been

determined to have accrued thereto i.e. using the example *supra*, if the cost of construction is $80.00 ft² the land owner pays $80.00 ft² however, if the cost of construction is $110.00 ft² the land owner pays $100.00 ft². Circumstances increasing the construction cost of the project cannot reflect an increase in the special benefit bestowed upon each lot or parcel of land from which the improvement has been determined to have accrued thereto. N.D.C.C. §40-23-07; *Bateman v. City of Grand Forks*, 2008 ND 72, ¶¶ 3, 20; 747 N.W.2d 117 (indicating that a full array of factors should be part of a fair assessment process and if that process produces an assessment that exceeds the benefit it is unconstitutional).

I. The Special Assessment Commission failed to comply with the statutory requirements of N.D.C.C. §40-23-07.

[3] This Court will reverse the acts of the Special Assessment Commission when on its face the legislative act was arbitrary and capricious or legally unreasonable. *Holter v. City of Mandan*, 2020 ND 152, ¶ 12, 946 N.W.2d 524, 527.

[4] The Grand Forks Special Assessment Policy in this matter does not specifically set out, as did the facts in *Holter*, that a unit of cost equals a unit of benefit however, using such a quotient is the danger Justice Tufte describes in his dissent:

> In short, the problem is this: ***the City calculated its determination of benefit to Holter's property using the same formula by which it calculated the costs it assessed to that property***. Under the City's policy, the benefit determination for a lot is defined as the unit cost allocation. The City's reduction of total assessments by five percent does not convert what is a cost allocation into a benefit determination. The City policy thus subverts the express intent of the

> statute that costs assessed to a lot be limited to no more than the benefit. The majority acknowledges the City's interchangeable use of assessment and benefit but appears to announce a rule that affirms the City's direct allocation of cost because something less than 100% of the total cost is assessed against the properties in the district.
>
> *Holter v. City of Mandan*, 2020 ND 152, ¶ 27, 946 N.W.2d 524, 530; (emphasis added) (Justice Tufte, dissenting)

[5] The Grand Forks City Council at ¶39 of its brief admits that there is not an independent finding of a special benefit that does not hinge on the project cost irrespective of the formula used.

> Appellants' argument is flawed and their brief lacks any supporting law. The very reason for assessments is to share in the cost of construction that leads to benefits for the properties. Moreover, Appellants ignore well established law. There is nothing that prohibits assessments based on the cost of construction. Rather, N.D.C.C. § 40-23-07 states that the commission "***shall*** assess against each of such lots and parcels of land such sum, not exceeding the benefits, as shall be necessary to pay its just proportion of the ***total cost of such work***." (emphasis added); See also *Buehler v. City of Mandan*, 239 N.W.2d 522 (N.D. 1976).
>
> Appellee's Brief at ¶39 (bold and italic added by Appellee)

[6] Three elements are required to comply with N.D.C.C. §40-23-07:

1. The special benefit accruing to each lot or parcel of land from the improvement must be determined;

2. The special assessment levied against each lot must be limited to its just proportion of the total cost of the improvement; and

3. The assessment against any lot or parcel of land must not exceed the benefit which has been determined to have accrued thereto.

> *Holter v. City of Mandan*, 2020 ND 152, ¶ 11, 946 N.W.2d 524, 527 citing *Bateman v. City of Grand Forks*, 2008 ND 72, ¶ 11, 747 N.W.2d 117.

[7] The Appellee conflates these elements into the bold terms "***shall*** assess against each of such lots and parcels of land such sum, not exceeding the benefits, as shall be necessary to pay its just proportion of the ***total cost of such work***." without giving effect to the fact that the assessment cannot be more than the benefit accrued and that the just proportion of assessment to be levied is a relationship to the other properties deemed to have likewise benefited from the property.

[8] The Special Assessment Commission failed to make any independent finding relative to the amount of benefit being provided by the stormwater sewer infrastructure project because the Special Assessment Commission findings was directed to assess the sum of $3,730,834.15 for the cost of the project and that the special assessments levied against the property described in attachment A are made in accordance with the city's standardized policies and formulas utilizing square footage assessments. *See* (R:21:9-10 and 11-18; R:21:Attachment A).

[9] The Special Assessment Committee in this case did not do even the minimal described by the majority in *Holter v. City of Mandan*, 2020 ND 152, 946 N.W.2d 524 which stated:

> Although the City's determination of benefits and assessments is based on a formula similar to others upheld by this Court, this case does raise some concerns. Under the City's policy, the terms "benefit" and "assessment" appear to be used interchangeably, which may explain why the special

> assessment commission determined the amount of the benefit to Holter's properties equaled the amounts assessed to them. However, the Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work. While the findings by the Special Assessment Commission on the amount of the benefit may be somewhat conclusory, the amount of the benefit was determined to be less than the total cost and was determined to be a just proportion of the total cost based on the City's formula.
>
> *Holter v. City of Mandan*, 2020 ND 152, ¶ 21, 946 N.W.2d 524, 529

[10] In the instant case, the Special Assessment Commission was given the number to assess by the City Council. The Special Assessment Commission clearly acted in an arbitrary, capricious, and legally unreasonable manner.

II. The Act of Levying the Special Assessment in this matter constitutes an unconstitutional taking.

[11] The calculation method employed by the City of Grand Forks is an unconstitutional taking under the circumstances where, as here, the cost of the project because of its complex or difficult nature is not comparable to other projects that may lend themselves to a simple form of calculation or relative benefit. Given the documented increase in the construction cost of this project due to retrofitting the infrastructure installation into a developed subdivision when the retrofit nature of the construction has a direct nexus to the City's failure to properly implement the utility infrastructure once the assessment district property was incorporated into the city by annexation. (R15). Additionally, the City as discussed above does not have a quantified amount of

benefit received by storm water sewer infrastructure as discussed above even though the City employs a standard formula. A taking can be described as follows:

> In *King v. Stark County*, 67 N.D. 260, 271 N.W. 771 (1937), we discussed the nature of a taking or damaging sufficient to sustain an action for inverse condemnation:
>
> > "It is not necessary that there be a direct injury to the property itself in order to create this liability. It is sufficient to warrant a recovery if there be 'some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.' *Rigney v. City of Chicago*, supra; *Mason City, etc., Railway Company v. Wolf*, 148 F. 961, 78 C.C.A. 589." 67 N.D. at 265-266, 271 N.W. at 774.
>
> *Eck v. Bismarck*, 283 N.W.2d 193, 199 (N.D. 1979).

[12] As an example of the relative cost imposed by the special assessments, Appellant Senske Rentals, LLC owns parcel number 44-2935-00001-000 which is subject to the levy of special assessments for the city projects referenced in the Initial Brief of Appellant at ¶4. On September 29, 2022 the Grand Forks Special Assessment Commission levied the special assessment amount for the Oscarville Paving and Lighting and on October 24, 2022 the Grand Forks City Council adopted and approved the special assessment levy.[1] The property value and special assessment levy are as follows.[2,3]:

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[1] https://www.grandforksgov.com/home/showpublisheddocument/45652 Appellants request that this Court take judicial notice of the Grand Forks City documents published

Prior Year	Comment	Value Type	Location	Class	Land Value	Dwelling Value	Improvement Value	M & E Value	Total Value
2022	3-13-2022	Appr	Urban	Comm	$428,500	$0	$454,800	$0	$883,300
2021	4/6/2021	Appr	Urban	Comm	$357,100	$0	$468,500	$0	$825,600
2020	3-20-2020	BofR	Urban	Comm	$251,100	$0	$500,200	$0	$751,300

Date	Project	Amount	% of Land	% Total
2018	Sanitary Sewer	$131,641.11	30.7	14.9
2021	Stormwater\Pond	$427,061.93	99.6	48.3
2022	Paving & Lighting	$171,660.85	40.0	19.4
	Total	$730,363.90	170.4	82.6

(R15:35-37); (footnote:1-3)

[13] The majority in *Holter* indirectly addressed the issue of a taking without comment:

> Holter asserts the City failed to determine the value of the benefits to her properties. She claims the assessments exceed the benefits to her properties in violation of N.D.C.C. § 40-23-07. She contends the assessments were unreasonable because they were slightly less than the total value of the properties. To support her argument, Holter provided a letter from a real estate agent stating the approximate value of her three lots was $50,000 to $75,000.
>
> *Holter v. City of Mandan*, 2020 ND 202, ¶ 17, 948 N.W.2d 858, 863

[14] This Court in *Lenertz v. City of Minot*, 2019 ND 53 discussed inverse condemnation in *Bala v. State*, 2010 ND 164, ¶ 8, 787 N.W.2d 761, by stating:

> "Article I, § 16 of the North Dakota Constitution . . . declares that '[p]rivate property shall not be taken or

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on the Grand Forks City website within the noted hyperlink pursuant to Rule 201 of the North Dakota Rules of Evidence.

[2] https://grandforkscity.northdakotaassessors.com/parcel.php?parcel=44.2935.001.00

[3] Appellants request that this Court take judicial notice of the Grand Forks City Assessor concerning parcel number 44-2935-00001-000 where each year is maintained within the noted hyperlink pursuant to Rule 201 of the North Dakota Rules of Evidence.

> damaged for public use without just compensation having been first made to, or paid into court for the owner.' '"Inverse condemnation actions are a property owner's remedy, exercised when a public entity has taken or damaged the owner's property for a public use without the public entity's having brought an eminent domain proceeding."' *Aasmundstad v. State*, 2008 ND 206, ¶ 15, 763 N.W.2d 748 (quoting *Knutson v. City of Fargo*, 2006 ND 97, ¶ 9, 714 N.W.2d 44). 'To establish an inverse condemnation claim, a property owner must prove a public entity took or damaged the owner's property for a public use and the public use was the proximate cause of the taking or damages.' *Aasmundstad*, at ¶ 15."
>
> See also *Irwin v. City of Minot*, 2015 ND 60, ¶¶ 6-7, 860 N.W.2d 849. Whether a taking of private property for public use occurred is a question of law, fully reviewable on appeal. *City of Minot v. Boger*, 2008 ND 7, ¶ 16, 744 N.W.2d 277; see also *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, ¶ 22, 903 N.W.2d 51; *Irwin*, at ¶ 6; *Bala*, at ¶ 8.
>
> *Lenertz v. City of Minot*, 2019 ND 53, ¶¶ 10-11, 923 N.W.2d 479, 485-86.

[15] Here the drastic nature of the levied special assessments have caused a taking due to the fact that the special assessments are as much as the improved value of the parcels and about 170% of the value of the bare land.

CONCLUSION

[16] In sum, the Special Assessments Commission failed to comply with the statutory requirements of Section 40-23-07, N.D.C.C. as the Commission did not use—or simply adopted the City Council's improper use—of an assessment method that fails to fairly, justly, and equitably provide an assessment amount equal to or less than the benefit especially conferred unto the property serviced

by the storm water infrastructure. In addition, the amount of the levied assessment constitutes a taking.

Dated this 26th day of October, 2022

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with Rule 32(a)(8)(A). N.D.R.App.P., that the above brief contains 12 pages, including footnotes and endnotes but excluding any addendum, which is within the limit of 12 pages.

Dated this 26th day of October, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2022 the following document:

1. **Reply Brief of Petitioners and Appellants;**

was filed electronically with the Clerk of Court through the ELECTRONIC FILING PORTAL OF THE NORTH DAKOTA SUPREME COUIRT, with like service of the above listed documents to the following:

Jenna R. Bergman at jbergman@fisherbren.com; and
Corey J. Quinton at cquinton@fisherbren.com

Dated this 26th day of October, 2022

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